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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

HAND DELIVER

Ms. Donna R. Searcy

Secretary

Federal Communications Commission

1919 M Street, N.W.

Washington, DC 20554

Dear Ms. Searcy:

On behalf of Capital Cities/ABC, Inc., transmitted herewith for filing with the Commission are an original and five copies of comments in GC Docket No. 92-52.

If there are any questions in connection with the foregoing, please contact the undersigned.

Sincerely yours,

Sam Antar

SA/ak

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	GC Docket No. 92-52
)	
Reexamination of the Policy)	RM-7739
Statement on Comparative)	RM-7740
Broadcast Hearings)	RM-7741

COMMENTS OF CAPITAL CITIES/ABC, INC.

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June 2, 1992

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Summary

The Commission has requested comment on the continued vitality of the comparative factors used to compare applicants for new broadcast facilities. In these Comments, we offer observations on five criteria: integration, diversification, past broadcast record, the minority preference and the proposed service continuity preference.

The integration factor, which was based on an assumption that integration of station ownership and management would lead to the best service to the public, should be eliminated. There is nothing inherent in the management of a station by an on-site owner that leads to superior local service. Under corporate ownership, significant programming decisions are still made at the station level in response to local needs. Moreover, there are ample economic and regulatory incentives for managers to be attuned to local needs whether or not they are also owners. Therefore, this factor is irrelevant to the "best practicable service" to the local community.

The diversification factor is of limited relevance to the goals of viewpoint diversity and economic competition and therefore should be significantly reduced in importance. These are the same goals that underlie the Commission's multiple ownership rules, and applicants that are in compliance with those rules should not be substantially penalized. We recognize that the addition of new voices to

the marketplace, particularly if those voices belong to minority owners, may still be worthy of some weight. On balance, however, we do not believe diversification should continue to be of "primary significance" in the comparative hearing process.

Past broadcast record and past broadcast experience are among the best predictors of the quality of future broadcast service. Therefore, they should be accorded significantly more weight than they currently receive. Broadcasters that provide a responsible programming service that serves community needs -- whether or not that service has been "unusually good" -- are entitled to have that experience counted in their favor.

The minority preference should be retained. Along with the Commission's tax certificate and distress sale policies, a separate comparative preference for minorities would help advance the important goal of increased minority ownership of broadcast properties.

A service continuity preference, under which credit would be awarded to applicants who commit to own and operate the station for at least three years, should be established. This preference would likely discourage speculation by non-broadcasters whose interest is merely to turn a quick profit, and would likely encourage stability, including investment in long-term programming that will benefit the public.

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To: The Commission

COMMENTS OF CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. ("Capital Cities/ABC") submits herewith its Comments in response to the Notice of Proposed Rule Making in the above-entitled proceeding ("Notice").¹

Introduction

The Commission has requested comment on the continued efficacy and relevance of the comparative criteria established in the Policy Statement on Comparative Broadcast Hearings (the "1965 Policy Statement").² These criteria govern the comparative hearing process between competing applicants for new broadcast facilities, and are currently

¹ GC Docket No. 92-52, Notice of Proposed Rule Making, FCC 92-98 (rel. April 10, 1992).

² 1 FCC 2d 393, 5 Rad. Reg. 2d (Pike & Fischer) 1901 (1965).

applicable in the comparative renewal hearing context as well.³

Capital Cities/ABC, in its own name or through wholly-owned subsidiaries, is the licensee of eight television stations and twenty-one radio stations. Our interests as broadcasters therefore could be directly affected by the outcome of this proceeding. In addition, the Company's view of regulation is that it should do no more than necessary to ensure the public interest goals of competition and diversity. Certain of the criteria at issue in this proceeding, particularly the diversification and integration criteria, do little if anything to further those goals.

In these Comments, we show that the integration factor is irrelevant to the Commission goal of the best practicable service to the public and therefore should be eliminated; that the diversification factor is of limited relevance to the goals of viewpoint diversity and economic

³ Seven (7) League Productions, Inc., 1 FCC 2d 1597 (1965). See also Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742, In the Matter of Formulation of Policies Relating to the Comparative Renewal Process, at paragraph 6. We note that, although the Commission has stated that it "will not address the distinct issues raised in comparative renewal proceedings, where a new applicant challenges the renewal of an incumbent licensee," it also requests comment on the "implications for comparative renewal proceedings of the revisions adopted in this proceeding." Notice at Paragraph 4, note 1. Capital Cities/ABC has filed Reply Comments in the Commission's ongoing proceeding in BC Docket No. 81-742 (filed November 7, 1988) relating to the comparative renewal process, and respectfully refers the Commission to those Reply Comments for its position on the application of these criteria in a pure comparative renewal context.

competition and therefore should be substantially reduced in importance; that past broadcast experience and past broadcast record should be given significant weight, since they are among the best predictors of the quality of future broadcast service; that the minority preference should be continued; and that the "service continuity preference" proposed by the Commission should be instituted.

I. INTEGRATION SHOULD BE ELIMINATED AS A COMPARATIVE FACTOR

Integration of station ownership and management was described in the 1965 Policy Statement as a factor of "substantial importance." It was assumed that, if the party with ultimate legal control were managing the station on-site, he would be more accessible to viewers and therefore more responsive to their concerns than a station manager who was not also an owner. Integration was therefore assumed to lead to the "best practicable service" to the local market. It was, however, viewed as a predictor of future service rather than a virtue in itself:

there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station. This factor is thus important in securing the best practicable service.⁴

⁴ 1965 Policy Statement, 5 Rad. Reg. 2d (Pike & Fischer) at 1909.

The Commission requests comment on the continued vitality of this factor, given the "highly competitive nature of today's broadcast market and the professionalism of today's broadcast operations," and specifically asks whether integration of station ownership and management necessarily results in a more responsive broadcast service than that provided by a non-integrated management structure.⁵ We believe that it does not. Even if the assumption that underlay the integration factor were valid in the context of the broadcast landscape of twenty-seven years ago (and the Commission has not offered empirical evidence to support it), its importance is gone or at least substantially diminished in today's competitive broadcast environment.

There is nothing inherent in the presence of the owner at the station that leads to superior local service. Corporate ownership of broadcast properties, and particularly multiple ownership, requires delegation of decision-making functions to responsible station management personnel. Significant programming decisions are made in response to local needs at the station level.⁶ The Commission has

⁵ Notice at paragraph 14.

⁶ The Court in Central Florida Enterprises, Inc. v. FCC, 44 Rad. Reg. 2d (Pike & Fischer) 345, 368-69 (D.C. Dir. 1978) regarded the Commission's favorable consideration of local autonomous managers in order to de-emphasize the integration factor as an evisceration of that factor. The criticism was based on the Commission's unexplained departure from the criterion as set forth in the 1965 Policy Statement, which had not been modified and therefore was in full effect. The Commission is of course legally free to review the criteria in that Policy Statement and change or

recognized that "group owners do not impose a monolithic editorial viewpoint on their stations, but instead permit and encourage independent expression by the stations in response to local community concerns and conditions ... [G]roup owners broadcast more issue-oriented programming than non-group-owned stations."⁷ Integration is therefore not a prerequisite to the broadcast of programming that best serves local interests.

Moreover, there is ample incentive today for broadcasters to be attuned to local community needs, whether or not an owner of the station is also its manager. First, there is a stronger economic motive than ever before. Broadcasters must fight for a share of the increasingly fragmented audience and can survive only by targeting and serving that audience's needs. The presence of radically increased competition in the past few decades is the most effective spur to providing programming that serves community needs, as the Commission has recognized time and time again.⁸ Second, the Commission provides additional incentive in the form of specific regulation requiring a station to be

eliminate them in the context of a rule making proceeding.

⁷ Report and Order in Gen. Docket No. 83-1009, 100 FCC 2d 17, 56 Rad. Reg. 2d (Pike & Fischer) 859 (1984) (Ownership Report and Order), on reconsideration, Memorandum Opinion and Order, 100 FCC 2d 74, 57 Rad. Reg. 2d (Pike & Fischer) 966 (1985) (Ownership Reconsideration Order), appeal dismissed sub. nom., National Association of Black Owned Broadcasters v. FCC, No. 85-1139 (D.C. Cir. Jan. 4, 1991). Ownership Report and Order at paragraph 9.

⁸ See, e.g., Program Exclusivity in the Cable and Broadcast Industries, 64 Rad. Reg. 2d (Pike & Fischer) 1818, 1822 (1988).

responsive to its community by broadcasting programming serving local needs and describing the ways in which that obligation has been met through the station's "issues/programs" lists.⁹ Neither of these incentives has any direct connection to owners as managers, and there is no reason to believe that a non-integrated owner will be any less motivated than an owner/manager to respond to its community. In fact, given the intensity of current broadcast competition, a less experienced owner might well conclude that hiring an experienced professional station manager will result in programming that better serves community needs.

There is no reason that a professional station manager would have less appreciation of issues of local importance than an owner/manager. To the extent that local residence is relevant, "...a professional manager is no less likely to live in the community served by his station than is an owner/manager."¹⁰ As has been true at the Capital

⁹ 47 C.F.R. §§ 73.3526(a)(8) and (9) require each broadcast licensee to place in its public file "a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period."

¹⁰ Bechtel v. FCC, 70 Rad. Reg. 2d (Pike & Fischer) 397, 401 (D.C. Cir. 1992). The Bechtel Court noted that although local residence will operate as an enhancement, the basic rationale of the integration credit cannot depend on it, since the credit operates independently of the owner's residence. Id. The 1965 Policy Statement made clear, however, that the Commission was "primarily interested in full-time participation. To the extent that the time spent moves away from full time, the credit given will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis." 5 Rad. Reg. 2d (Pike & Fischer) at 1909. See also id. at 1910, note 7: "Of course, full-time

Cities/ABC stations, many general managers and other senior managers stay with their stations for long periods of time and are deeply aware of and involved in their communities.

Finally, the Commission's practice of awarding full integration credit to applicants in spite of the presence of passive owners provided those owners "have no authority to control the licensee"¹¹ can lead to integration proposals that run counter to common sense. We agree with the Bechtel court's observation (echoed in the Notice at paragraph 15) that the integration factor encourages applicants to fashion "'strange and unnatural' business arrangements."¹² Given the increased competition in markets of every size and other incentives to serve the public interest, the traditional "integration" proposal has become an unnecessary burden on

participation is also necessarily accompanied by residence in the area." Regardless of the weight or effect of the "local residence" enhancement, the fact remains that there is nothing inherent in integration of ownership and management that leads to better local service.

¹¹ Anax Broadcasting Inc., 87 FCC 2d 483, 488 (1981). See other opinions cited in Bechtel, 70 Rad. Reg. 2d (Pike & Fischer) at 401.

¹² 70 Rad. Reg. 2d (Pike & Fischer) at 401. The Court continued: "In our case, for example, best friends and co-owners of a station swear not to consult with other; family members with valuable broadcast knowledge and experience agree not to assist the tyro station manager in the family; people with steady jobs and families in one city pledge to move to and work in small summer towns in Delaware with which they have no former connection." Id. at 401-02.

Commission resources.¹³ It should be eliminated.¹⁴

II. THE WEIGHTS ACCORDED TO DIVERSIFICATION AND PAST BROADCAST EXPERIENCE AND RECORD SHOULD BE SUBSTANTIALLY MODIFIED

A. Diversification Should Be Minimized As A Comparative Factor.

The 1965 Policy Statement described the diversification factor as being of "primary significance."¹⁵ Application of this criterion was designed to achieve the twin goals of promotion of diversity of viewpoints and prevention of undue concentration of economic power.¹⁶ These are the same goals that underlie the Commission's multiple ownership rules, which prescribe the level of mass media ownership that is deemed to be consistent with the public interest. In its evaluations of group ownership limits, the Commission has not

¹³ See Notice at paragraph 15: "Examination of potentially unreliable proposals can be a time-consuming and uncertain process."

¹⁴ We note that focussing on "paper" integration proposals can have a particularly perverse consequence in the comparative renewal context. Once an incumbent is found to have exhibited sufficient sensitivity to its community to deserve a renewal expectancy, it is irrelevant whether the broadcaster did so with managers who were owners or with managers who were not owners. It makes no sense to "compare" a station found to deserve a renewal expectancy with an applicant that proposes to achieve sensitivity to community needs in a different fashion, i.e., through integration of ownership and management. It is simply too easy for challengers to present a superior showing on integration.

¹⁵ 5 Rad. Reg. 2d (Pike & Fischer) at 1908.

¹⁶ Notice at paragraph 21.

disregarded diversity concerns, but has balanced those considerations with other factors such as cost savings likely to lead to better programming.¹⁷ In the same context, the Commission has concluded that there is no absolute correlation between group ownership and decreased diversity or harmful economic concentration.¹⁸ We recognize that the addition of new voices to the marketplace, particularly if those voices belong to minority owners, may still be worthy of some weight as predictive of potential additional diversity of viewpoint. In light of these Commission decisions, however, we do not believe diversification should continue to be of "primary significance" or even accorded substantial weight in the comparative hearing process.

Commission decisions in the past decade to relax the multiple ownership rules have been made only after careful evaluation of the probable effects of increased group ownership of broadcast properties on diversity and competition in the broadcast marketplace. Chief among the Commission's

¹⁷ "Clearly if the only relevant consideration were implementation of the policy of diversification, an absolute limitation of one broadcast station to any one person ... would best serve the public interest", Ownership Reconsideration Order at paragraph 18, quoting Report and Order in Docket No. 10822, 43 FCC 2797, 2801-2 (1954). The Commission has also noted that courts have acknowledged that diversity is not "absolute." Id. See also Report and Order in MM Docket No. 91-140, In re Revision of Radio Rules and Policies, FCC 92-97 (rel. April 10, 1992) (Revision of Radio Rules and Policies) at paragraph 39.

¹⁸ Ownership Report and Order, Ownership Reconsideration Order.

conclusions during these deliberations were that diversity and competition concerns are defined primarily with respect to the local market, and that increased group ownership does not decrease diversity of viewpoint.¹⁹ The Commission has been sensitive to local market diversity and competition by fashioning ownership rules and policies that are dependent on market characteristics.²⁰ Therefore, if the multiple ownership rules are complied with, there is no rationale for also giving substantial weight to diversification as a comparative factor.²¹

In addition, as the Commission has noted, broadcasting's "ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its

¹⁹ Ownership Report and Order. See also Revision of Radio Rules and Policies at paragraph 20. The Commission expressly found that "group owned stations do not impose monolithic viewpoints on their various holdings. To the contrary, we noted that the economics of each local market require autonomous decisions by each station with respect to its editorial judgments." Ownership Reconsideration Order at paragraph 21. Accord, Revision of Radio Rules and Policies at paragraph 21.

²⁰ See, e.g., Second Report and Order in MM Docket 87-7, 4 FCC Rcd 1741, 65 Rad. Reg. 2d (Pike & Fischer) 1589 (1989) (One-To-A-Market Order); Revision of Radio Rules and Policies; 47 C.F.R. §73.3555.

²¹ Consideration of the diversification factor is particularly unnecessary in the renewal context because it has the potential to penalize an incumbent broadcaster whose ownership interests comply fully with the Commission's multiple ownership rules. It is both unnecessary and arbitrary for the Commission, in effect, to reconsider its decisions in the area of media ownership through the haphazard process of comparative renewal proceedings. Moreover, the stakes in the renewal context are much greater than in the new broadcast application hearing context: the latter is loss of an opportunity, while the former is loss of an established franchise.

economic viability."²² A broadcaster with other operating stations is more likely to have the economic wherewithal to launch a new broadcast station by being able to realize economies of scale, including through combining administrative, sales, programming, and other functions. Application of a strong diversification factor thus also penalizes the applicant that may be in the best position to operate the station in the most economical and efficient manner. Its weight should be substantially minimized.

B. Past Broadcast Experience And Record Should Be Given More Weight As A Comparative Factor.

The Notice requests comment on whether the criterion of past broadcast record should be retained. We believe that it should not only be retained, but given significantly more weight than it is currently accorded. The 1965 Policy Statement indicated that past broadcast record and past broadcast experience would be largely disregarded in the absence of an "unusually good" or "unusually poor" performance.²³

In light of the changes in the broadcast marketplace since 1965, we believe this factor should be given far greater weight. The competitive and economic pressures facing broadcasters today have made it much more difficult to produce

²² Revision of Radio Rules and Policies at paragraph 10.

²³ 5 Rad. Reg. 2d (Pike & Fischer) at 1910, 1912.

a responsible programming service that serves local community needs. Broadcasters achieving this objective -- whether or not their service has been "unusually good" -- are entitled to have this experience counted in their favor. Past broadcast record and experience are among the best predictors of station operation that is economical, efficient and responsive to community needs. Moreover, the current policy, which all but ignores the virtues of broadcast experience in selecting applicants for a broadcast license, is clearly an anomaly in Commission regulation.

III. THE MINORITY PREFERENCE SHOULD BE RETAINED

Under the proposal in the Notice, if integration were eliminated as a comparative factor, minority ownership would continue to receive the same proportional credit as under the current system, but the minority owner would not need to be integrated into management of the station.²⁴ Capital Cities/ABC supports the treatment of minority ownership as a separate comparative factor.²⁵

This preference is based on the assumption that increased minority ownership will encourage greater viewpoint

²⁴ Notice at paragraph 24.

²⁵ Congress has endorsed the Commission's efforts to encourage minority ownership of broadcast stations, and the U.S. Supreme Court has recently held that awarding an enhancement for minority ownership in comparative proceedings for new licenses did not violate the equal protection rights of a non-minority applicant. Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990).

diversity. As the Metro Court recognized, minority owners are more likely to hire minorities for "managerial and other important roles where they can have an impact on station policies."²⁶ Maintaining a minority preference would thus appear to have a salutary effect regardless of the continued existence of an integration factor. Moreover, there is no comparable integration requirement for the Commission's tax certificate policy (allowing the seller of a station to defer the gain realized on a sale if the sale is made to a minority broadcaster) or its distress sale policy.²⁷ Along with these policies, a separate comparative preference for minorities should advance the important goal of increased minority ownership of broadcast properties.

IV. A SERVICE CONTINUITY PREFERENCE SHOULD BE ESTABLISHED

The Commission proposes to include a new criterion in the comparative evaluation, i.e., to award credit to applicants who commit to own and operate the station for at least three years.²⁸ Capital Cities/ABC agrees that this preference should be established. There are several potential public interest benefits to this preference. First, it will discourage speculation by non-broadcasters whose purpose is

²⁶ Id. at 3001.

²⁷ The Metro Court upheld the Commission's distress sale policy without requiring minority integration.

²⁸ Notice at paragraph 28.

to turn a profit rather than to develop a strong local broadcast station serving the community's needs.²⁹ Second, it is likely that an applicant committing to a three-year service continuity period will have thoroughly examined the local market, and will thus have a strong, realistic assessment of its ability to operate the station for that period. Third, the preference will encourage stability, including investment in long-term programming that will benefit the public.

With respect to enforcement, we believe that every application for premature transfer should be carefully scrutinized to see whether the applicant had misrepresented its intention to operate the station for the three-year period. In view of the economic situation confronting broadcasters, however, we do not believe that a "distress sale" to a minority buyer should be the only option. As the Commission has recognized, allowing a "station doctor" to save a failing station serves the public interest by infusing new capital and ultimately keeping the station on the air.³⁰

²⁹ See id., citing the Bechtel court's concern that the ability to transfer a station after only one year can "eviscerate" the purpose of the comparative process.

³⁰ Memorandum Opinion and Order In the Matter of Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control) FCC 88-398 (rel. Feb. 10, 1989), at paragraph 6. See also Report and Order in BC Docket No. 81-897, In the Matter of Amendment of Section 73.3597 of the Commission's Rules, 52 Rad. Reg. 2d (Pike & Fischer) 1081 (1982).

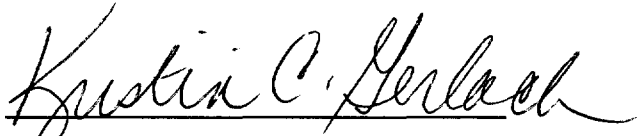
Accordingly, a prospective seller of a broadcast station should not be precluded from transferring its station if it can prove compelling circumstances that were not foreseen at the time of the application. In this regard, the Commission should consider requiring each applicant for a new broadcast facility that intends to claim a service continuity preference to submit a three-year business plan for its proposed operation of the station. In the event of a proposed premature transfer of the station, scrutiny of that plan would aid the Commission in determining whether the circumstances leading to the proposed transfer were truly unforeseen. This requirement would also be a deterrent to those applicants who do not have a good faith intention to operate the station for the three-year period.

Conclusion

For the foregoing reasons, Capital Cities/ABC respectfully requests that the Commission modify the factors used in comparative hearings for new broadcast facilities in the manner described in these Comments.

Respectfully submitted,

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